

1
2
3
4
5
6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 DAVID B. DURAN,

12 Plaintiff,

13 v.

14 OMAR MANDUJO, et al

15 Defendants.
16

Case No.: 15-CV-2745-DMS-WVG

**REPORT AND
RECOMMENDATION FOR ORDER
GRANTING MOTION TO DISMISS
FOR FAILURE TO STATE A CLAIM**

[Doc. No. 91]

17 Pending before the Court is a Motion to Dismiss Plaintiff David B. Duran's
18 ("Plaintiff") Fourth Amended Complaint ("FAC") for failure to state a claim pursuant to
19 Federal Rule of Civil Procedure 12(b)(6) filed by Defendants Larry Lewis and Jonta Yancy
20 (collectively "Defendants"). As explained below, the Court **RECOMMENDS** that the
21 Motion be **GRANTED** with prejudice.
22

23 **I. BACKGROUND**

24 Plaintiff, a state prisoner proceeding *pro se* and *in forma pauperis*, filed a civil rights
25 Complaint pursuant to 42 U.S.C. § 1983 on December 7, 2015, alleging Defendants
26 violated his rights guaranteed under the Fourth and Eighth Amendments of the United
27 States Constitution. (ECF No. 1.) On August 2, 2016, Plaintiff filed a Motion for Leave to
28 File an Amended Complaint in order to add two exhibits. (ECF No. 33.) The Court granted

1 the motion and ordered Plaintiff to file his First Amended Complaint by September 2, 2016.
2 (ECF No. 34.) On August 18, 2016, Plaintiff filed a Motion to Amend Document No. 33
3 by Permission of the Court, requesting the Court to construe his previous motion as his
4 First Amended Complaint. (ECF No. 37.) On August 23, 2016, the Court granted the
5 motion and deemed as the First Amended Complaint the complaint and the exhibits filed
6 in the Motion for Leave to File an Amended Complaint. (ECF No. 40.)

7 On September 8, 2016, defendants Mandujano, A. Hernandez, L. Hernandez, and
8 Seaman filed a motion to dismiss Plaintiff's First Amended Complaint for failure to state
9 a claim. (ECF No. 41.) On January 31, 2017, this Court filed a Report and Recommendation
10 ("R&R"), recommending the motion be granted in part with leave to amend and granted in
11 part without leave to amend. (R&R, ECF No. 64.) On March 2, 2017, the Honorable Dana
12 M. Sabraw adopted the R&R, granted the motion, and dismissed Plaintiff's First Amended
13 Complaint with leave to amend. (ECF No. 69.)

14 On April 7, 2017 Plaintiff filed a Second Amended complaint, followed by a Motion
15 to Amend on April 11, 2017. (ECF Nos. 73, 76.) In his Motion, Plaintiff requested leave
16 to amend in order to add newly identified defendants Larry Lewis¹ and Jonta Yancy. (ECF
17 No. 76.) The motion was granted and on April 26, 2017, Plaintiff filed his Third Amended
18 Complaint, naming defendants Lewis and Yancy but omitting defendants Mandujano, A.
19 Hernandez, L. Hernandez, and Seaman. (ECF No. 80.) Defendants Mandujano, A.
20 Hernandez, L. Hernandez, and Seaman filed duplicative motions for entry of judgment in
21 favor of the unnamed defendants on April 27, 2017 and May 11, 2017, arguing their
22 omission was tantamount to voluntary dismissal. (ECF Nos. 82, 86.) On May 10, 2017, the
23 Court granted Plaintiff leave to file a Fourth Amended Complaint that includes "all
24 allegations against all defendants in one document no later than June 15, 2017." (ECF No.
25 85 at 2:1-2.)
26
27

28 ¹ Defendant Lewis was erroneously sued as "Larry Louis." (*See* ECF No. 91 at 2:1-6.)

1 Plaintiff filed his Fourth Amended Complaint on May 19, 2017, naming as
2 defendants Mandujano, A. Hernandez, L. Hernandez, Seaman, Lewis, and Yancy.² (FAC,
3 ECF No. 89.) The FAC alleges defendants Mandujano, A. Hernandez, L. Hernandez, and
4 Seaman violated Plaintiff's Fourth Amendment rights through the execution of an invalid
5 search warrant and use of excessive force in executing the search warrant in violation of
6 his Eighth Amendment rights. The FAC alleges defendants Lewis and Yancy conducted
7 an illegal search and seizure in violation of his Fourth Amendment Rights and violated
8 Plaintiff's protection against cruel and unusual punishment in violation of the his Eighth
9 Amendment rights.

10 On June 2, 2017, defendants Mandujano, A. Hernandez, L. Hernandez, and Seaman
11 filed a motion to dismiss the FAC. (ECF No. 94.) On August 22, this Court filed a R&R,
12 recommending the motion be granted and defendants Mandujano, A. Hernandez, L.
13 Hernandez, and Seaman be dismissed with prejudice. (ECF No. 102.)

14 **III. LEGAL STANDARD**

15 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
16 defense that the complaint "fail[s] to state a claim upon which relief can be granted,"
17 generally referred to as a motion to dismiss. Fed. R. Civ. P. 12(b)(6). The Court evaluates
18 whether a complaint states a cognizable legal theory and sufficient facts in light of Federal
19 Rule of Civil Procedure 8(a), which requires a "short and plain statement of the claim
20 showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). Although Rule 8 "does
21 not require 'detailed factual allegations,' . . . it [does] demand[] more than an unadorned,
22 the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
23 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a
24 plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more
25 than labels and conclusions, and a formulaic recitation of the elements of a cause of action
26

27 ² After receiving Plaintiff's Fourth Amended Complaint, naming all defendants, the Court denied
28 defendants Mandujano, A. Hernandez, L. Hernandez, and Seaman's motion for an entry of judgment in
their favor. (See ECF No. 90.)

1 will not do.” *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286
2 (1986)). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further
3 factual enhancement.’” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at 557).

4 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,
5 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
6 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
7 when the facts pled “allow [] the court to draw the reasonable inference that the defendant
8 is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). That is not to
9 say that the claim must be probable, but there must be “more than a sheer possibility that a
10 defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’ a defendant’s liability”
11 fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557).
12 Further, the Court need not accept as true “legal conclusions” contained in the complaint.
13 *Id.* This review requires context-specific analysis involving the Court’s “judicial experience
14 and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-pleaded facts do not
15 permit the court to infer more than the mere possibility of misconduct, the complaint has
16 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.* The Court
17 will grant leave to amend unless it determines that no modified contention “consistent with
18 the challenged pleadings ... [will] cure the deficiency.” *DeSoto v. Yello Freight Sys., Inc.*,
19 957 F.2d 655, 658 (9th Cir. 1992) (citation omitted).

20 Where, as here, a plaintiff appears *pro se* in a civil rights suit, the Court also must
21 be careful to construe the pleadings liberally and afford the plaintiff any benefit of the
22 doubt. *Garmon v. Cty. of L.A.*, 828 F.3d 837, 846 (9th Cir. 2016). The rule of liberal
23 construction is “particularly important in civil rights cases.” *Ferdik v. Bonzelet*, 963 F.2d
24 1258, 1261 (9th Cir. 1992). In construing a *pro se* civil rights complaint liberally, however,
25 a court may not “supply essential elements of the claim that were not initially pleaded.”
26 *Ivey v. Bd. of Regents of the Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague
27 and conclusory allegations of official participation in civil rights violations are not
28 sufficient to withstand a motion to dismiss.” *Id.* Thus, at a minimum, even the *pro se*

1 plaintiff “must allege with at least some degree of particularity overt acts which defendants
2 engaged in that support [his] claim.” *Jones v. Cmty. Redevelopment Agency*, 733 F.2d 646,
3 649 (9th Cir. 1984) (internal quotations and citation omitted).

4 The Court should grant a *pro se* litigant leave to amend his complaint “unless it
5 determines that the pleading could not possibly be cured by the allegation of other facts.”
6 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (internal quotation omitted). Before
7 dismissing a complaint filed by a *pro se* plaintiff, a court must give some notice of the
8 complaint’s deficiencies. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).
9 Nevertheless, when amendment of a *pro se* litigant’s complaint would be futile, denial of
10 leave to amend is appropriate. *See James v. Giles*, 221 F.3d 1074, 1077 (9th Cir. 2000).

11 **IV. DISCUSSION**

12 **A. Judicial Notice/Incorporation By Reference**

13 Before proceeding to the merits of the Motion to Dismiss, the Court first must
14 determine whether certain records attached to and referenced in the Motion to Dismiss are
15 judicially noticeable or acceptable for consideration under the doctrine of incorporation.
16 Defendants have asked the Court to incorporate the following items: (1) Superior Court of
17 the State of California, County of Imperial, Search Warrant No. SW 2014-011, citing to
18 the search warrant attached to Plaintiff’s original complaint; (2) Statement of Facts Roster
19 of Public Agencies Filings filed December 2013, 2014, and 2016, showing Pioneers
20 Memorial Healthcare District is a public entity; and (3) Licenses from the State of
21 California Department of Public Health, showing that Pioneers Memorial Healthcare
22 District operates and maintains the general acute care hospital in Brawley, CA. (ECF No.
23 91 at 28-29.) Defendants also request the court judicially notice the fact that on and since
24 January 16, 2014, Pioneer Memorial Healthcare District owned Pioneers Memorial
25 Hospital. (ECF No. 91.)

26 “Generally, a court may not consider material beyond the complaint in ruling on a
27 [motion to dismiss].” *Intri-Plex Technologies, Inc. v. Crest Group, Inc.*, 499 F.3d 1048,
28 1052 (9th Cir. 2007) (citation omitted). “However, a court may take judicial notice of

1 matters of public record without converting a motion to dismiss into a motion for summary
2 judgment, as long as the facts noticed are not subject to reasonable dispute.” *Id.* A court
3 may also consider materials “incorporated into the complaint.” *Coto Settlement v.*
4 *Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). The doctrine of “incorporation by
5 reference” has been extended to permit courts “to consider documents in situations where
6 the complaint necessarily relies upon a document or the contents of the document are
7 alleged in a complaint, the document’s authenticity is not in question and there are no
8 disputed issues as to the document’s relevance.” *Id.*

9 **i. Search Warrant**

10 Defendants request the Court take judicial notice of a search warrant attached to
11 Plaintiff’s original complaint. (ECF No. 91-2). However, since Plaintiff has filed amended
12 complaints since the original complaint, the Court treats the latter as non-existent. *See*
13 *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011) (“[I]t is well-established that
14 an amended complaint supersedes the original, the latter being treated thereafter as non-
15 existent.”) (internal quotation omitted); *see also Rhodes v. Robinson*, 621 F.3d 1002, 1005
16 (9th Cir. 2010) (applying the same standard to a pro se prisoner’s second amended
17 complaint made pursuant to § 1983). Given this, the Court declines to consider the warrant
18 attached to Plaintiff’s original complaint.³

19 **ii. Roster of Public Agencies Filing; Licenses from the State of California**
20 **Department of Health; Ownership of Pioneers Memorial Hospital**

21 Defendants attached to their motion three Statement of Facts Roster of Public
22 Agencies Filings filed December 2013, 2014, and 2016, respectively. (Foote Decl., ECF
23 No. 91-3, Exs. 1, 2, 3.) Defendants also attached licenses from the California Department
24 of Health that certify Pioneers Memorial Healthcare District to operate and maintain the
25 _____

26 ³ Plaintiff attached an incomplete version of the search warrant to his FAC lacking its essential
27 attributes. This copy is missing pages and lacked the signature of the authorizing judge. If Defendants
28 had requested the Court to take judicial notice of the search warrant attached to the FAC, the Court
would have declined to do so for the simple reason that, on its face, the search warrant lacks
trustworthiness given the missing information.

1 general acute care hospital in Brawley, California. (Foote Decl., Ex. 4.) The Court finds
2 consideration of these filings and licenses for the present motion to be appropriate without
3 converting the motion to dismiss into a motion for summary judgment. Both the Statement
4 of Facts Roster of Public Agencies Filing and Licenses from the California Department of
5 Health are undisputed matters of public record. The Public Agency Filings have been filed
6 with California's Secretary of State, are accessible to the public, and are undisputed by
7 Plaintiff. Similarly, the licenses issued by the California Department of Health are state
8 government-issued documents whose authenticity are not reasonably disputed.

9 Finally, Defendants request that the Court take judicial notice of the fact that "since
10 January 2014, Pioneers Memorial Hospital has been owned and operated by Pioneers
11 Memorial Healthcare District, a public entity." (Mot. at 29:15-18.) Similar to the licensing,
12 the Court finds consideration of this appropriate because this is a matter of public record
13 that is not subject to reasonable dispute.

14 **B. § 1983 Claims**

15 Defendants argue Plaintiff's FAC should be dismissed because Plaintiff's FAC fails
16 to comply with Federal Rule of Civil Procedure ("Rule") 8(a). Defendants further argue
17 the FAC should be dismissed because Plaintiff cannot support any § 1983 claim against
18 Defendants because: (1) *Respondeat Superior* claims are unavailable in § 1983 claims; (2)
19 Plaintiff's claims are time barred; and (3) Plaintiff failed to comply with the California
20 Government Claims Act.⁴

21 The FAC indicates Plaintiff underwent a blood draw pursuant to a search warrant.
22 (See e.g., FAC at 8:14-15, 9:15-19, 16, 17:12-15.) Plaintiff appears to allege Defendants
23

24
25 ⁴ Defendants make eight separate arguments for dismissal. While the arguments made by Defendants
26 appear cogent, they also appear to rest on details contained in Plaintiff's First Amended Complaint, which
27 the Court does not consider in deciding the present Motion. See *Valadez-Lopez v. Chertoff*, 656 F.3d 851,
28 857 (9th Cir. 2011) ("[I]t is well-established that an amended complaint supersedes the original, the latter
being treated thereafter as non-existent.") (internal quotation omitted); see also *Rhodes v. Robinson*, 621
F.3d 1002, 1005 (9th Cir. 2010) (applying the same standard to a pro se prisoner's second amended
complaint made pursuant to § 1983).

1 performed an illegal search and seizure and subjected Plaintiff to cruel and unusual
2 punishment when conducting the blood draw. (FAC at 33:14-17, 34:6-13.)

3 **i. Applicable Law**

4 “Section 1983 provides a cause of action for ‘the deprivation of any rights,
5 privileges, or immunities secured by the Constitution and laws of the United States.’”
6 *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 508 (1990) (quoting 42 U.S.C. § 1983),
7 *superseded on other grounds by statute*, 42 C.F.R. § 430.0. To prevail on a claim for the
8 violation of constitutional rights under 42 U.S.C. § 1983, a plaintiff must prove two
9 elements: (1) that a person acting under the color of state law committed the conduct at
10 issue; and (2) that the conduct deprived the plaintiff of some right, privilege, or immunity
11 conferred by the Constitution or the laws of the United States. *See Nelson v. Campbell*, 541
12 U.S. 637, 643 (2004). “Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is
13 proper if the complaint is devoid of factual allegations that gave rise to a plausible inference
14 of either element.” *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

15 **ii. Failure to Comply with Rule 8**

16 Defendants argue Plaintiff has failed to comply with Rule 8(a) because the FAC is
17 “vague and undetailed [].” (Mot. at 14:17-22.) In response, Plaintiff simply states he “has
18 made clear factual arguments, that are plaus[i]ble.” (Opp’n at 19:10-11.)

19 The Court agrees with Defendants. A thorough review of the FAC reveals that it is
20 almost entirely devoid of factual allegations. Rather, the FAC is merely excerpts of case
21 law mixed with objections to this Court’s previous R&R. Plaintiff simply states that
22 defendant Lewis is being sued for an “illegal search and seizure of plaintiffs biological
23 matter,” insinuating that his DNA is already on file. (FAC at 33:15-17.) Plaintiff then states
24 that defendant Lewis is liable as the “director” of Pioneer Memorial. (*Id.* at 34:10-13.)
25 Plaintiff then claims defendant Yancy is guilty of assault for stabbing Plaintiff. (*Id.* at 35:7-
26 9.) However, these are nothing more than “legal conclusion[s]” and the Court need not
27 accept them as true. *Iqbal*, 556 U.S. at 677. Critically, the FAC does not even describe the
28 event in which Plaintiff claims his rights were violated or where the event occurred.

1 Setting aside the legal conclusions and construing the FAC liberally, Plaintiff's
2 claim does not even reach the point where it could be called a "naked assertion" as it is
3 devoid of any supporting facts. *Iqbal*, 556 U.S. at 677. Thus, Plaintiff has failed to "allege
4 with at least some degree of particularity overt acts which defendants engaged in that
5 support [his] claim." *Jones*, 733 F.2d at 649. Given this, the Court is unable to draw a
6 "reasonable inference" that Defendants are "liable for the misconduct alleged." *Iqbal*, 556
7 U.S. at 677. Accordingly, the Court **RECOMMENDS** Defendants' Motion be
8 **GRANTED** and Plaintiff's claim that Defendants violated his Fourth and Eighth
9 Amendment rights be **DISMISSED**.

10 iii. *Respondeat Superior* Claim

11 Defendants argue the FAC should be dismissed in regards to defendant Lewis
12 because *respondeat superior* claims are unavailable in § 1983 claims. (Mot. at 14:26.)
13 Plaintiff offers nothing in response to this argument in his Opposition.

14 Plaintiff claims Lewis is liable for violations of his Fourth and Eighth Amendment
15 rights because he is the "director" of the Pioneer Memorial Hospital. (FAC at 33:9-13.)
16 "Under Section 1983, supervisory officials are not liable for actions of subordinates on any
17 theory of vicarious liability." *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989). A
18 supervisor may be liable only if (1) he or she is personally involved, or (2) there is "a
19 sufficient causal connection between the supervisor's wrongful conduct and the
20 constitutional violation." *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012) (quoting
21 *Hansen*, 885 F.2d at 646), *overruled in part on other grounds by Peralta v. Dillard*, 744
22 F.3d 1076, 1083 (9th Cir. 2014).

23 Plaintiff has not claimed nor pled any facts that indicates Lewis was personally
24 involved or causally connected to any wrongful conduct. Thus, Lewis is not liable as a
25 supervisor. Accordingly, the Court **RECOMMENDS** the Motion be **GRANTED** and
26 Plaintiff's claim that Lewis violated his Fourth and Eighth Amendment rights be
27 **DISMISSED**.

28 iv. California Government Claims Act

1 Defendants argue that Plaintiff fails to comply with the Government Claims Act
2 because his complaint does not assert compliance with the Act. (Mot. At 24:21-26.)
3 Defendant argues the Act is applicable here because Pioneer Memorial is a public entity
4 and the alleged acts committed by Defendants were done during the scope of their
5 employment. (*Id.* at 23:8-10, 25:16-20.) Plaintiff offers nothing in response to this
6 argument in his Opposition.

7 California's Government Claims Act provides that a party seeking to recover money
8 damages for personal injury from a public entity must submit a claim to the entity within
9 six months after accrual. Cal. Gov. Code § 911.2; *see also City of Stockton v. Superior*
10 *Court*, 171 P.3d 20, 25 (Cal. 2007). "No suit for money damages may be brought against
11 a public entity on a cause of action for which a claim is required to be presented until a
12 written claim therefor has been presented to the public entity and has been acted upon or
13 has been deemed to have been rejected." *City of Stockton*, 171 P.3d at 25 (citing Cal. Gov.
14 Code § 945.4.) A suit brought against a public entity must be filed within six months of the
15 response from the public entity. Cal. Gov. Code § 945.6(a)(1). "The deadline for filing a
16 lawsuit against a public entity, as set out in the [Government Claims Act], is a true statute
17 of limitations defining" when a plaintiff must file a lawsuit for facts set out in a claim.
18 *Shirk v. Vista Unified School Dist.*, 164 P.3d 630, 634 (Cal. 2007). Subject to exceptions
19 not relevant here, "a cause of action against a public employee ... for injury resulting from
20 an act ... in the scope of his employment as a public employee is barred if an action against
21 the employing public entity for such injury is barred..." Cal. Gov. Code § 950.2. The
22 claims presentation requirement "constitutes an element of any cause of action arising
23 under the Government Claims Act" and failure to meet this requirement subjects a claim
24 to dismissal for failure to state a claim. *Mohsin v. Cal. Dep't of Water Res.*, 52 F.Supp.3d
25 1006, 1017-18 (E.D. Cal. 2014).

26 Section 911.2 applies because Pioneer Memorial Hospital is a public entity.
27 Plaintiff's allegations are in regards to the acts of Defendants that occurred in the scope of
28 their employment. However, Plaintiff's FAC makes no reference to this requirement and

1 presents no facts to indicate that the requirement was met. Thus, Plaintiff has omitted a
2 necessary element of his claim. Accordingly, the Court **RECOMMENDS** the Motion be
3 **GRANTED** and the FAC be **DISMISSED** for failing to plead compliance with the Act.⁵

4 **v. Statute Of Limitations**

5 Defendants argue the FAC should be dismissed with prejudice because the
6 complaints against Defendants were filed after the statute of limitations expired. (Mot. at
7 21:26.) Plaintiff offers nothing in response to this argument in his Opposition.

8 The closest Plaintiff comes to stating a cause of action against Yancy is the allegation
9 that Yancy is “guilty of assault” for “stabbing” Plaintiff. (FAC at 35:7-9.) Additionally,
10 Plaintiff appears to claim that Lewis is vicariously liable as the director of Pioneer
11 Memorial Hospital. (*Id.* at 33:9-13.) Construing this as a claim for battery, even had
12 Plaintiff sufficiently stated a battery claim against Defendants, which he has not, his claim
13 would be barred under California Code of Civil Procedure (“CCP”) section 340.5, which
14 provides:

15 In an action for injury or death against a health care provider
16 based upon such person’s alleged professional negligence, the
17 time for the commencement of action shall be three years after
18 the date of injury or one year after plaintiff discovers, or through
19 the use of reasonable diligence should have discovered, the
20 injury, whichever occurs first. In no event shall the time for
21 commencement of legal action exceed three years unless tolled
22 for any of the following: (upon proof of fraud, (2) intentional
concealment, or (3) the presence of a foreign body, which has no
therapeutic or diagnostic purpose or effect, in the person of the
injured person.

23 *See also* Cal. Code Civ. Proc. § 340.5(1)-(2); *Larson v. UHS of Rancho Springs, Inc.*, 179
24 Cal. Rptr.3d 161, 172-73 (Cal. Ct. App 2014) (claim of intentional tort for battery construed
25 as professional negligence where no allegation intentional tort committed for an ulterior
26

27 ⁵ As will be discussed immediately below, notwithstanding the comparatively shorter time frame in
28 which to pursue a claim subject to the Government Claims Act, Plaintiff is still time barred in bringing
suit against Defendants pursuant to California Code of Civil Procedure § 340.5.

1 purpose).⁶

2 Section 340.5 applies here because Yancy, a phlebotomist working at Pioneers
3 Memorial Hospital, is a healthcare provider, and because Plaintiff alleges an injury based
4 on Yancy's professional negligence – specifically, the drawing of blood.⁷ Section 340.5
5 also applies to Lewis because vicarious liability is “wholly dependent upon or derived from
6 the liability of the employee, [and] any substantive defense that is available to the employee
7 inures to the benefit of the employer.” *Lathrop v. Healthcare Partners Med. Grp*, 8
8 Cal.Rptr.3d 668, 675-76 (Cal. Ct. App. 2004).

9 A plaintiff has one year from the date an injury was discovered to bring suit. *Belton*
10 *v. Bowers Ambulance Service*, 20 Cal.4th 928, 934-35 (Cal. 1999). In *Belton*, a prisoner
11 claimed he was injured during transportation from prison to a hospital. *Id.* at 929-30. The
12 Supreme Court of California held that because the plaintiff “discovered the injury on the
13 day it occurred” he had one year from the date of injury to bring suit absent any tolling
14 available. *Id.* at 930. Plaintiff alleges the incident in question took place on January 16,
15 2014. (FAC at 1.) Accordingly, he had until January 16, 2015 to file his complaint, absent
16 possible tolling.

17 Tolling of the statute of limitations is governed by CCP § 352.1, which provides for
18 tolling up to two years when a person is imprisoned at the time of the cause of action
19 accrues. *See* Cal. Code Civ. Proc. § 352.1; *see also Hardin v. Straub*, 490 U.S. 536, 543-
20 44 (1989) (finding state statutory tolling does not frustrate § 1983 goals); *Torres v. City of*
21 *Santa Ana*, 108 F.3d 224, 226 (9th Cir. 1997). Given this, Plaintiff is allowed a maximum
22 of two additional years to file a complaint, up to the three-year maximum allowed under
23

24 ⁶ Section 1983 contains no specific statute of limitations, thus, for § 1983 claims, the courts will borrow
25 the relevant state statute of limitations that would apply in a personal injury action. *See Wallace v. Kato*,
26 549 U.S. 384, 387 (2007); *Alameda Books, Inc. v. City of Los Angeles*, 631 F.3d 1031, 1041 (9th Cir.
27 2011) (“The statute of limitations applicable to an action pursuant to 42 U.S.C. §1983 is the personal
28 injury statute of limitations of the state in which the cause of action arose.”).

⁷ The phrase ‘Health care provider’ refers to any person licensed pursuant to Division 2 (commencing
with Section 500) of the California Business and Professions Code. Cal. Code Civ. Proc. §340.5(1). *See*
also Cal. Bus. & Prof. Code § 1246 (defining certified phlebotomist).

1 CCP § 340.5. *Belton*, 20 Cal.4th at 934-35 (finding § 352.1 allows for statutory tolling
2 beyond the one-year limitation period but not longer than the three-year maximum
3 permitted under § 340.5).

4 Allowing tolling pursuant to CCP 352.1, the statute of limitations would have been
5 tolled for two years and expired on January 16, 2017. Because Plaintiff did not seek to
6 amend his complaint to add new claims against new parties until April 11, 2017, Plaintiff's
7 claims against Defendants are untimely. Accordingly, the Court **RECOMMENDS**
8 Defendants Motion be **GRANTED** and the FAC be **DISMISSED** with **PREJUDICE**.

9 **C. Leave to Amend**

10 Notwithstanding the Court's recommendation that Plaintiff's FAC be dismissed with
11 prejudice as time barred, the Court further recommends the FAC be dismissed with
12 prejudice in regards to Defendants' other arguments for the reasons articulated below.

13 Federal Rule of Civil Procedure 15(a)(2) provides that "a party may amend its
14 pleading only with the opposing party's written consent or the court's leave. The court
15 should freely grant leave when justice so requires." Fed. R. Civ. P. 15(a)(2). When
16 determining whether to grant leave to amend, courts weigh certain factors: "undue delay,
17 bad faith or dilatory motive on the part of [the party who wishes to amend a pleading],
18 repeated failure to cure deficiencies by amendments previously allowed, undue prejudice
19 to the opposing party by virtue of allowance of the amendment, [and] futility of amendment
20 [.]” *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

21 Although prejudice to the opposing party “carries the greatest weight[.]...a strong
22 showing of any of the remaining *Foman* factors” can justify the denial of leave to amend.
23 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) (per curiam).
24 Analysis of these factors can overlap. For instance, a party's “repeated failure to cure
25 deficiencies” constitutes “a strong indication that the [party] has no additional facts to
26 plead” and “that any attempt to amend would be futile[.]” *Zucco Partners, LLC v. Digimarc*
27 *Corp.*, 552 F.3d 981, 988, 1007 (9th Cir. 2009) (internal quotation marks omitted)
28 (upholding dismissal of complaint with prejudice when there were “three iterations of [the]

1 allegations—none of which, according to [the district] court, was sufficient to survive a
2 motion to dismiss”); *see also: Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1084
3 (9th Cir. 2000) (affirming dismissal without leave to amend where plaintiff failed to correct
4 deficiencies in complaint, where court had afforded plaintiff opportunities to do so, and
5 had discussed with plaintiff the substantive problems with his claims), *amended by* 234
6 F.3d 428, *overruled on other grounds by Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th
7 Cir. 2007); *Plumeau v. Sch. Dist. # 40 Cnty. of Yamhill*, 130 F.3d 432, 439 (9th Cir. 1997)
8 (denial of leave to amend appropriate where further amendment would be futile).

9 Including the original complaint, Plaintiff has now had *five* opportunities to state a
10 claim for which relief could be granted. When recommending dismissal of Plaintiff’s First
11 Amended Complaint, this Court advised Plaintiff of the deficiencies of that complaint for
12 his claims regarding the warrant and excessive force. (*See* R&R at 11:1-14, 11:19-12:7.)
13 In the order adopting the first Report and Recommendation, the Honorable Dana M.
14 Sabraw granted Plaintiff leave to file a second amended complaint and again advised
15 Plaintiff to “cure[] the pleading deficiencies identified in the R&R.” (ECF No. 69 at 2.)
16 When this Court granted Plaintiff’s request to file a Third Amended Complaint, Plaintiff
17 was yet again advised the complaint “must specifically allege facts” and “precisely identify
18 which cause(s) of action are brought against each person.” (ECF No. 77.)

19 Plaintiff failed to heed these warnings when filing his Third and now Fourth
20 Amended Complaint. Notwithstanding the fact that defendants Yancy and Lewis were only
21 added in the third amended complaint, Plaintiff was still advised of his requirement to plead
22 all facts and how they relate to each defendant throughout this litigation. Had this been
23 Plaintiff’s original complaint, perhaps some latitude would be permitted to allow him to
24 cure the noted deficiencies. But this is Plaintiff’s fifth attempt and there appears to be no
25 interest or effort by Plaintiff to provide even a minimally sufficient pleading despite
26 repeated admonitions from the Court. Notwithstanding Plaintiff’s statute of limitation
27 problems, his repeated failure to cure deficiencies is a strong indication to the Court that
28 Plaintiff has no additional facts to plead. Given this, the Court finds that any further

1 attempts to amend would be futile. Accordingly, the Court **RECOMMENDS** the FAC be
2 dismissed **WITH PREJUDICE**.

3 **V. CONCLUSION**

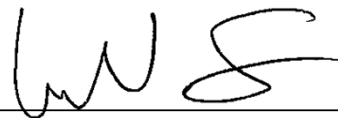
4 For the reasons set forth herein, it is **RECOMMENDED** that Defendant's Motion
5 to Dismiss be **GRANTED** and Plaintiff's FAC be **DISMISSED** with **PREJUDICE**. This
6 Report and Recommendation is submitted to the United States District Judge assigned to
7 this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(1988) and Federal Rule of
8 Civil Procedure 72(b).

9 **IT IS ORDERED** that no later than **September 29, 2017**, any party to this action
10 may file written objections with the Court and serve a copy on all parties. The document
11 shall be captioned "Objections to Report and Recommendation." The parties are advised
12 that failure to file objections within the specified time may waive the right to raise those
13 objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

14 **IT IS FURTHER ORDERED** no replies to objections will be accepted, and the
15 motion will be deemed taken under submission on September 29, 2017.

16 **IT IS SO ORDERED.**

17 Dated: August 31, 2017



18
19 Hon. William V. Gallo
20 United States Magistrate Judge
21
22
23
24
25
26
27
28